Supreme Court U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ROBERT D. PALADINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's opinion in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460 (1984) warrants a general principle of appellate review that a defendant may not obtain "two bites at the apple," thereby requiring defendants to cease their efforts at obtaining an acquittal once a reversible error has been committed.

2. Whether the Seventh Circuit, as well as the Third, Fifth, and Eighth Circuits, have properly followed this Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005).

CERTIFICATE OF INTEREST

The Petitioner, **ROBERT D. PALADINO**, is represented in these proceedings by counsel, Thomas Anthony Durkin, Durkin & Roberts, 53 West Jackson Boulevard, Suite 615, Chicago, Illinois 60604, and Patrick W. Blegen, 53 West Jackson Boulevard, Suite 1362, Chicago, Illinois 60604.

Neither party has any other interest nor represents any other party or interest in these proceedings.

Thomas Anthony Durkin
Patrick W. Blegen

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CERTIFICATE OF INTEREST ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. Certiorari Should be Granted to Determine Whether and to What Extent *Luce* and *Ohler* Should be Expanded Beyond Their Limited Holdings, and to Correct the Seventh Circuit's Overly Expansive View in this Case. 6

II. This Case Gives the Court an Opportunity to Resolve a Conflict Between the Circuit Courts Regarding the Proper Weight a District Court is to Give to the Sentencing Guidelines Following *United States v. Booker*. 13

CONCLUSION 18

INDEX TO APPENDICES

Seventh Circuit Opinion, February 25, 2005 . APPENDIX A

Seventh Circuit Order, September 23, 2005 . APPENDIX B

District Court Opinion, July 27, 2005 ..... APPENDIX C

TABLE OF AUTHORITIES

CASES

Luce v. United States,
469 U.S. 38, 105 S.Ct. 460 (1984) ..... *passim*

Ohler v. United States,
529 U.S. 753, 120 S.Ct. 1851 (2000) 4, 7, 12, 13

Palmieri v. Defaria,
88 F.3d 136 (2d Cir. 1996) 8

United States v. Ameline,
400 F.3d 646 (9th Cir. 2005) 14, 17

United States v. Bond,
87 F.3d 695 (5th Cir. 1996) 8

United States v. Booker,
543 U.S. 220, 125 S.Ct. 738 (2005) ..... *passim*

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 4, 14

United States v. Dean,
414 F.3d 725 (7th Cir. 2005) 5, 15, 15

United States v. Dimatteo,
759 F.2d 831 (11th Cir. 1985) 8

United States v. Goldman,
41 F.3d 785 (1st Cir. 1994) 8

United States v. Gonzalez,
134 Fed.Appx. 595 (3rd Cir. 2005) 14

United States v. Griffin,
818 F.2d 97 (1st Cir. 1987) 8

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 14

United States v. Lincoln,
413 F.3d 716 (8th Cir. 2005) 14

United States v. Mares,
402 F.3d 511 (5th Cir. 2005) 14

United States v. Morales-Chaires,
_ F.3d _, 2005 WL 3307395 (10th Cir. 2005) 14

United States v. Mykytiuk,
415 F.3d 606 (7th Cir. 2005) 5, 14, 15

United States v. Namer,
149 Fed.Appx. 385 (6th Cir. 2005) 14

United States v. Ortiz,
857 F.2d 900 (2d Cir. 1988) 8

United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 1, 10

United States v. Price,
409 F.3d 436, 443 (D.C. Cir. 2005) 14

United States v. Sanderson,
966 F.2d 184 (6th Cir. 1992) 8

United States v. Weichert,
783 F.2d 23 (2d Cir. 1986) 8

United States v. Wilson,
307 F.3d 596 (7th Cir. 2002) 7

United States v. Winingear,
422 F.3d 1241 (11th Cir. 2005) 14

United States v. Wright,
218 F.3d 812 (7th Cir. 2000) 17

STATUTES & OTHER AUTHORITY

U.S. Constitution, Amend. VI 2

28 U.S.C. §1254(1) 2

18 U.S.C. §3553 ..... 5, 14, 15, 16, 17

Federal Rule of Evidence 106 ..... *passim*

Federal Rule of Evidence 404(b) 11

Federal Rule of Evidence 609(a) 6, 7, 11

1 J. Weinstein & M. Berger, Weinstein's Federal Evidence
§103.14 (2d. Ed. 2000) 7

D. Louisell & C. Mueller, Federal Evidence § 11 (1977) .. 7

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert D. Paladino, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Seventh Circuit entered in this case on February 25, 2005, and the final order denying his appeal entered on September 23, 2005.

OPINION BELOW

The opinion of the United States Court of Appeals affirming Paladino's conviction and ordering a limited sentencing remand appears at Appendix A to the Petition, and is reported at *United States v. Paladino*, 401 F.3d 471 (7th Cir.

2005). The United States Court of Appeals order affirming Paladino's sentence appears at Appendix B to the Petition.

JURISDICTION

The Seventh Circuit's opinion affirming Paladino's conviction, but maintaining jurisdiction and ordering a limited sentencing remanding was entered on February 25, 2005. (App. A) On September 23, 2005, the Seventh Circuit entered an order affirming Paladino's sentence, and denying a full sentencing remand. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

Rule 106 of the Federal Rules of Evidence states as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

STATEMENT OF THE CASE

The crux of the government's case was that Paladino joined with his co-defendants in an effort to dupe investors out of millions of dollars by falsely offering up a prime bank / European trading program which promised two things: outrageously high returns on investments, and a risk-free investment in that the investors' money was to be held in escrow. (App. A, p. 3) Other individuals looking to borrow money rather than make investments were duped into paying advance fees for loans that were to be funded after the European investments came to fruition. (App. A, p. 3) The European trades never came to pass and virtually all of the investors lost their money. (App. A, p. 3)

The government's case against Paladino came down to knowledge; *i.e.*, did he know that investors were being defrauded. (App. A, p. 6) Prior to Paladino and his co-defendants having been indicted, the Securities and Exchange Commission (SEC) filed a lawsuit against each of the defendants as well as various companies such as Lennox Investment Group. (App. A, p. 6) During the course of the SEC's lawsuit, several of the defendants submitted to depositions, including Paladino. (App. A, p. 6-7)

At trial, the district court permitted the government, over Paladino's objection, to introduce selected excerpts of Paladino's SEC deposition testimony. (App. A, p. 6) As but two of many examples of the redactions at issue, one of the government's redactions simply cut Paladino's answer in half, quoting him as saying, "I learned that this money that's been coming in was investment money." Paladino's complete answer in the SEC transcript, however is, "I learned that this money that's been coming in was investment money, and I was totally surprised because I assumed this whole time that this

was trade money." (R. 331-10, p. 1728; App. A, p. 6-7) Another government redaction removed the date at which Paladino first saw a crucial document, omitting Paladino's testimony that he saw the document only after the scheme was over and the SEC had filed its suit. (App. A, p. 7)

The Seventh Circuit agreed with Paladino that the above described redactions, as well as others, were misleading and harmful, and violated Rule 106 of the Federal Rules of Evidence and the doctrine of completeness. (App. A, p. 7) Relying on this Court's decisions in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460 (1984), and *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851 (2000), however, the Seventh Circuit concluded that because Paladino testified, and could have thereby cured the district court's error by simply reading the redacted portions of the deposition, he gave up his right to contest the error. (App. A, p. 7-8) According to the Seventh Circuit, Paladino should have refrained from testifying, awaited his conviction, and then won a retrial on appeal. (App. A, p. 8) Because he did not do so, Paladino was not entitled to a new trial based on the district court's error.

Paladino was sentenced to 72 months imprisonment under the federal sentencing guidelines. (App. A, p. 11) Based on *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the Seventh Circuit acknowledged that Paladino's sentence violated his Sixth Amendment right to trial by jury and conducted a plain error analysis. (App. A, p. 11-15) The Seventh Circuit refused the automatic remand approach adopted by the Sixth and Fourth Circuits, and instead adopted a variation of the plain error analysis employed by the Second Circuit in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (App. A, p. 20)

Thus, the Seventh Circuit chose not to order that

Paladino be re-sentenced. Instead, the Seventh Circuit retained jurisdiction over the appeal, and ordered a limited remand to the district court. (App. A, p. 20-21) The district court was directed to inform the Seventh Circuit whether it would impose a different sentence under the advisory guideline regime; if it would, then Paladino had established plain error, and his sentence would be vacated and a full remand ordered. (App. A, p. 21)

After conducting the requisite inquiry, the district court informed the Seventh Circuit that it would impose the same sentence on Paladino and all of his codefendants. (App. B, p. 1) In reaching its decision, the district court concluded that after *Booker* the guidelines must be properly calculated, and only then, "as to each defendant, it must be considered whether good reason exists to impose a sentence outside of the Guidelines range." (App. C, p. 4-9) In the meantime, the Seventh Circuit determined that a properly calculated guideline sentence was entitled to a presumption of reasonability. *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005). Because there were no issues over the guideline calculations themselves, but only over the proper sentence in a post-*Booker* §3553 analysis, Paladino's sentence was, therefore, effectively insulated from challenge.[1]

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[1]Paladino and his codefendants were ultimately remanded for full re-sentencing, but only because of errors in the terms of supervised release and statutory maximums on certain counts. As the district court indicated it would, it reimposed the same sentences after remand.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should be Granted to Determine Whether and to What Extent *Luce* and *Ohler* Should be Expanded Beyond Their Limited Holdings, and to Correct the Seventh Circuit's Overly Expansive View in this Case.

More than twenty years ago, in *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460 (1984), this Court resolved a circuit split by holding that "to raise and preserve for review the claim of improper impeachment with a prior conviction [under Rule 609(a)], a defendant must testify." *Id.* at 43. The decision rested on two rather clear-cut propositions regarding appellate review. First, potential harm resulting from impeachment by prior conviction is merely speculative without the factual background of the entire trial, including the defendant's testimony. Second, because a harmless error finding would be impossible, certain defendants might obtain the windfall of automatic reversal by "planting" reversible error where they had no intention of actually testifying. *Id.* at 42. In a concurring opinion joined by Justice Marshall, Justice Brennan noted the limited scope of the decision, stating, "I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a) . . . In [cases] in which the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate." *Id.* at 44 (Brennan, J, concurring).

Sixteen years later, in a deeply divided 5 - 4 decision, the Court determined that a defendant could not challenge on appeal the district court's ruling admitting a prior conviction under Rule 609(a) even where she did testify, because she

fronted the issue with the jury by eliciting her own conviction on direct examination. *Ohler v. United States*, 529 U.S. 753, 102 S.Ct. 1851 (2000). The majority opinion, written by Chief Justice Rehnquist, relied on *Luce*, *supra*, and emphasized the general proposition that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Id.* at 755, *quoting*, 1 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 103.14, p. 103-30 (2d. Ed. 2000). The majority also noted that both the government and defendant in criminal cases must make choices, and the defendant's choice here deprived the government of its own; *i.e.*, whether to risk possible error by admitting the prior conviction. *Id.* at 757. The dissenting opinion written by Justice Souter and joined by Justices Stevens, Ginsburg and Breyer noted that the reasoning of *Luce* did not apply because there was a full factual record to review, including the defendant's testimony. *Id.* at 761 (Souter, J., dissenting) As well, the dissent noted there was no issue of "planting" reversible error because the defendant was merely attempting to remove the sting of evidence already ruled admissible - "[h]aving done his best by objecting, the adversary would be indeed ill treated if then he was held to have thrown it all away by doing his best to protect his position by offering evidence of his own." *Id.* at 762-63, *quoting*, D. Louisell & C. Mueller, Federal Evidence § 11, p. 65 (1977).

Using *Luce* and *Ohler* as a springboard, the Seventh Circuit as well as others courts have determined in various cases unrelated to Rule 609(a) that a party may waive his right to contest a ruling on appeal where the party's own decision moots the issue. *See, e.g.*, *United States v. Wilson*, 307 F.3d 596 (7th Cir. 2002) (where the trial court ruled *in limine* that if the defendant testified about an "associate" then the government could introduce evidence of his selective silence on the issue previously, the court could not review the ruling because the

defendant did not testify to the matter at issue); *United States v. Goldman*, 41 F.3d 785 (1st Cir. 1994) (holding that the reasoning of *Luce* applies equally to the defendant's objections under Rules 403 and 404); *United States v. Griffin*, 818 F.2d 97 (1st Cir. 1987) (dealing with *Luce* in context of Rule 403); *Palmieri v. Defaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a particular defense, in order to preserve the claim of error, the defendant must actually pursue that defense at trial); *United States v. Weicheri*, 783 F.2d 23 (2d Cir. 1986) (applying *Luce* to Rule 608(b)); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege if he were to testify at a hearing on his motion to withdraw his guilty plea, the defendant must take the stand and testify in order to challenge the ruling on appeal); *United States v. Sanderson*, 966 F.2d 184 (6th Cir. 1992) (*Luce* applied to Rule 608(b)); *United States v. Dimatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). In each of these cases, and every other which counsel's research has uncovered, the trial court has made an "advance" ruling that does not come into play unless the defendant (or party in a civil case) takes a particular course of action. If the party abandons the particular course of action, the advance ruling then becomes unassailable on appeal.

The Court's intervention is necessary here to prevent the unwarranted expansion of *Luce's* principles far beyond issues involving "advance" rulings. As the matter before the Court demonstrates, the Seventh Circuit has expanded *Luce's* concern over the "planting" of reversible error so far as to embrace a

general prohibition against "two bites at the apple." The court specifically held, therefore, that where a defendant suffers an adverse ruling on a Rule 106 completeness objection he must either refrain from testifying and wait patiently for his reversal on appeal, or he may give up his right to appeal the issue by testifying and attempting to cure the trial court's error himself. Such a rule stretches *Luce* beyond all reason and limitations.

As its opinion makes clear, the Seventh Circuit accepted as fact, and wholeheartedly agreed with Paladino, that the district court violated Rule 106 of the Federal Rules of Evidence by allowing the government to make serious, harmful redactions to his SEC deposition. (App. A, p. 7) And, the court made no mention that it considered the error to be harmless. Nevertheless, the court determined that because he testified, Paladino had the opportunity to correct this error himself.

> He took the stand and could if he had wanted read to the jury the parts of the deposition that the government had suppressed. . . . He did not do this . . . That was a tactical error. His testimony would have been more effective — in part because it would have demonstrated the government's mendacity — had he exposed the government's misleading editing.[2] *Id.* (Internal citations omitted)

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[2]Since the district court authorized the government's "misleading editing," it is doubtful that the same court would have permitted testimony designed to demonstrate the government's mendacity.

The court analogized Paladino's situation to *Luce*, stating:

> [t]he specific evidentiary error in *Luce* was improper impeachment with a prior conviction, but the principle is the same: "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify," 469 U.S. at 43; for "claim of improper impeachment with a prior conviction" read "claim of violation of Rule 106."[3] *Id.* at 8.

Acknowledging the difficult position in which Paladino found himself, the court nevertheless upheld his conviction:

> [t]his rule puts the defendant to a hard tactical choice. But the alternative would be to give him two bites at the apple; testify, and try to win an acquittal; if that fails, appeal and try to get a new trial on the basis of the judge's ruling. . . . The Supreme Court prefers the first of these unsatisfactory resolutions to the second, and we are bound. *Id.* (internal citation omitted).

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[3]This analogy makes no sense unless the court meant "for review of the claim of violation of Rule 106 a defendant must *not* testify." Paladino had raised, as a secondary argument, that he was effectively forced to testify as a result of the district court's Rule 106 violation. If that is what the court truly meant, however, then the Seventh Circuit has created an as of yet unheard of principle of appellate review; *i.e*, errors under Rule 106 are not subject to review unless the defendant refrains from testifying.

The instant case represents a perfect illustration of the wisdom of Justice Brennan's concurring opinion in *Luce*, explaining that the decision "might not necessarily be appropriate" in other contexts. Rule 106 and the doctrine of completeness embodied therein is so far afield from Rule 609(a) that the Seventh Circuit's application of *Luce* and *Ohler* is misplaced from the outset. Rule 609(a) deals with attacking the credibility of a witness; and, in the case of a criminal defendant, it is naturally contingent on whether the defendant testifies. *Cf.*, Fed. R. Evid. 404(b) (permitting the introduction of prior bad acts regardless of whether a defendant testifies). One might conclude, therefore, that it is perfectly sensible to require testimony as a prerequisite to a full review of a Rule 609(a) objection.

Rule 106, on the other hand, has nothing to do with whether a defendant testifies. As explained in the Advisory Committee Notes:

> Rule 106 "is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the *inadequacy of repair work when delayed to a point later in the trial. See*, McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or *as part of his own case*." FRE Rule 106, Advisory Committee Notes (emphasis added)

By improperly extending *Luce* and *Ohler* to fit Rule 106, the Seventh Circuit has effectively eviscerated it of its purpose. The Seventh Circuit believes that Paladino could have cured the district court's error through his testimony. But that

position ignores the "inadequacy of repair work when delayed to a later point in trial." The Seventh Circuit likewise believes that Paladino's failure to read the redacted portions to the jury was a "tactical error." This position ignores Paladino's right to "develop the matter . . . as part of his own case," presumably in the manner he chooses.

The expansion from *Luce* and *Ohler* to a Rule 106 error is flawed for other notable reasons as well. For example, this case, and Rule 106 motions in general, do not suffer from the same problems of speculation faced by the Court in *Luce*. The record is fully developed, including Paladino's testimony, and the impact of the error can be fully assessed. In addition, the Seventh Circuit's concern about giving Paladino "two bites at the apple" are unfounded. To avoid getting two bites, the Seventh Circuit suggested that after the Rule 106 error occurred, Paladino should have stopped his efforts to obtain an acquittal and relied on the forthcoming reversal. (App. A, p. 8) This position confounds the concerns expressed in *Luce*. *Luce* was not concerned with defendants making every effort to obtain an acquittal at the trial level. Rather, the Court was concerned that a defendant would engage in a form of "sandbagging" by planting an issue, for example by making a motion to preclude admission of a prior conviction, that the defendant knows is irrelevant because he has no intention of testifying. *Luce*, 469 U.S. at 42. There is no such concern here. A defendant cannot raise a Rule 106 objection until the government seeks to introduce a redacted statement, so a planted Rule 106 motion is impossible. As well, defendants have no incentive to pursue a Rule 106 objection that they have no intention of winning. The concerns expressed by the Seventh Circuit are, therefore, nonexistent and hardly worth announcing a new rule of appellate review.

Conversely, the expansion of *Luce* and *Ohler* announced in this matter may very well have a serious and unwarranted negative impact on the appellate rights of defendants. It is not difficult at all to imagine the rationale here being applied to other errors that a defendant could conceivably attempt to correct through his testimony. A trial court might, for example, erroneously admit a defendant's statement that was obtained illegally. Under the Seventh Circuit's rule announced here, the defendant would be required to refrain from testifying in order to obtain appellate review. If the defendant testified, he could perhaps explain the statement, or the circumstances under which it was obtained, in an attempt cure the trial court's error. Assuming his explanations did not win him an acquittal, however, the Seventh Circuit would deny the defendant appellate review, as he would otherwise reap the benefit of "two bites at the apple." Such a result would turn appellate review on its head, and subject defendants not merely to a difficult choice, but to a Hobson's choice.

This Court's intervention is critical to set proper limits on the scope of *Luce* and *Ohler* and to clarify the impact these decisions should have on the appellate rights of defendants in other contexts. At the very least, certiorari should be granted to clarify that the opinion of the Seventh Circuit in this matter conflicts with this Court's decisions.

II. This Case Gives the Court an Opportunity to Resolve a Conflict Between the Circuit Courts Regarding the Proper Weight a District Court is to Give to the Sentencing Guidelines Following *United States v. Booker*.

Since this Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the Seventh Circuit has concluded that a properly calculated guideline range carries

with it a rebuttable presumption of reasonableness, and that it is entitled to greater weight than the factors set forth in 18 U.S.C. §3553(a). *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005). Three other circuits have adopted similar approaches. *See*, *United States v. Gonzalez*, 134 Fed.Appx. 595, 598 (3rd Cir. 2005) (unpublished opinion); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005). The remaining circuits to have considered the issue have concluded that the guideline range is but one factor to be considered in conjunction with the factors set forth in 18 U.S.C. §3553, and that there is no presumption of reasonableness. *See*, *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (specifically declining to adopt any presumption of reasonableness); *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005); *United States v. Namer*, 149 Fed.Appx. 385, 402 (6th Cir. 2005) (unpublished order); *United States v. Ameline*, 400 F.3d 646, 655-56 (9th Cir. 2005); *United States v. Morales-Chaires*, __ F.3d __, 2005 WL 3307395, *3 (10th Cir. 2005); *United States v. Price*, 409 F.3d 436, 443 (D.C. Cir. 2005).[4]

This Court's intervention is necessary to resolve this dispute among the circuits and to clarify the weight to which a properly calculated guideline's advisory sentence is entitled.

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[4]It appears that the First Circuit has not yet decided what weight the guidelines range is afforded under the new sentencing regime. The Eleventh Circuit, has thus far specifically declined to adopt any approach despite the government's urging of a *per se* reasonableness of a sentence within the guidelines range. *See*, *United States v. Winingear*, 422 F 3d 1241, 1246 (11th Cir. 2005).

Petitioner submits that the circuits determining that the guidelines are entitled to no more weight than the §3553 factors, and that the guidelines are not entitled to a rebuttable presumption of reasonableness, have appropriately followed the Court's decision in *Booker*. Contrary decisions, such as the Seventh Circuit's approach in *Dean* and *Mykytiuk*, and the district court's position in re-considering Paladino's sentence here, are wrongly decided and inconsistent with *Booker*. (App. C, pp. 4-9) The district court concluded that a "good reason" must exist to impose a sentence outside of the guidelines, and further concluded that in "most cases" the guideline sentence will be appropriate. *Id.* The Seventh Circuit has held that a properly calculated guideline sentence is entitled to a "rebuttable presumption" of reasonableness. *See*, *Dean* and *Mykytiuk*, *supra*. These opinions effectively return the guidelines to their pre-*Booker* mandatory nature where the only way around the guideline sentence was a departure.

Booker specifically rejected the position that the ability to grant a departure saved the guidelines from *Apprendi*. *Booker's* discussion of departures applies equally to the Seventh Circuit's rebuttable presumption of reasonableness and the district court's requirement of a "good reason" to sentence outside the guidelines. The Court stated in *Booker*:

> At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally

> permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely,* holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for 'substantial and compelling reasons,' that exception was not available for Blakely himself. 542 U.S., at ---, 124 S.Ct., at 2535. The sentencing judge would have been reversed had he invoked the departure section to justify the sentence. *Booker*, 125 S.Ct. at 750-51.

Simply put, the guidelines could not escape *Apprendi* just because departures were available. The district court's "good reason" standard, when combined with the Seventh Circuit's "rebuttable presumption," should suffer the same fate.

That the district court and Seventh Circuit's opinions have led to a *de facto* return to mandatory sentencing guidelines becomes clear when one examines the district court's reasons for rejecting Paladino's request for a lower sentence. At his original sentencing, Paladino requested a downward departure on the basis of extraordinary family circumstances. The motion was denied because the court did not believe the facts were sufficient to justify a departure. (App. C, p. 18) In similarly rejecting Paladino's argument that his family circumstances should justify a lower sentence after *Booker* under §3553(a), the district court stated, "[e]ven if the Court were to be convinced that the situation otherwise justified a substantial reduction, such as 1 or 2 years less incarceration, there would still be a 4-to-5 year separation [of Paladino from his family]. That would not avoid the effect of a lengthy separation." (App. C, p. 18-19) In essence, the district court rejected a lower sentence because it would not *eliminate* Paladino's family difficulties. Such

reasoning is a remnant of the Seventh Circuit's analysis of family circumstances departures under the guidelines. *See*, *United States v. Wright*, 218 F.3d 812 (7th Cir. 2000) (holding that a departure based on extraordinary family circumstances may not be justified where the resulting sentence is still so long that release comes too late to promote the welfare of the family.) Under §3553(a) a defendant's family circumstances should be capable of resulting in a sentence outside of the guidelines whether or not they would *eliminate* or merely help to alleviate the family difficulties. The district court's decision to the contrary reveals that its decision, colored by the Seventh Circuit's "rebuttable presumption," conflict with the instruction of *Booker* by returning the guidelines to their pre-*Booker* standing.

A better practice, and more consistent with *Booker*, is set forth in the decisions of the various circuits noted above that have concluded that the guidelines are but one factor to be considered in conjunction with §3553(a) in fashioning a reasonable sentence. Rather than imposing a "good reason" or "rebuttable presumption" standard, those courts have concluded that the guidelines should not be afforded any greater weight by the sentencing court. As the Ninth Circuit has noted, "the advisory guideline range is only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence." *Ameline*, 400 F.3d at 655-56. The Ninth Circuit went on to demonstrate that, for example, "the Sentencing Guidelines' limitations on the facts a court may consider in sentencing -- *e.g.*, the impermissible grounds for departure set forth in 5K2.0(d) -- no longer constrain the court's discretion in fashioning a sentence within the statutory range." *Id.* at 656.

In addition to resolving the conflict amongst the circuits, certiorari should be granted to address the Seventh Circuit and

district court's decisions which are in direct conflict with *Booker*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 03-2296, 03-2383—86, 04-1951, 04-2339, 04-2378

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT D. PALADINO, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 01 CR 852—**William T. Hart**, *Judge.*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDY VELLEFF,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 02 CR 398—**Joan Humphrey Lefkow**, *Judge.*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN PEYTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 03 CR 10054—**Joe Billy McDade**, *Judge.*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARRELL TURNER,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 3:03-CR-22—**Robert L. Miller, Jr.**, *Chief Judge.*

ARGUED FEBRUARY 14, 2005—DECIDED FEBRUARY 25, 2005

Before POSNER, WOOD, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* We have consolidated for decision several criminal appeals, argued the same day, all of which

present the key issue left open by the Supreme Court's decision in *Booker v. United States*, 125 S. Ct. 738 (2005)—the application of the plain-error doctrine to appeals from sentences rendered under the federal sentencing guidelines before the Supreme Court ruled that they are advisory rather than mandatory. Three of the cases present nonsentencing issues as well, and we begin with them.

Paladino and his codefendants were convicted by a jury of a variety of federal crimes arising out of a scheme to defraud investors that succeeded in fleecing $11 million from the victims. The scheme had two stages, but only the second, which lasted from 1995 to 1997, generates nonsentencing issues. Defendant Iles, whose function was to recruit the investors, to whom she promised absurd returns—more than 100 percent *per week* for at least 40 weeks—made a variety of false representations. The one most significant to her appeal is that she and James Wardell (who died before he could be indicted) were reputable and experienced investment advisors. In fact Iles had pleaded guilty to federal fraud charges in 1988 and the following year had been banned by the SEC from ever associating with members of the securities industry, while Wardell had been convicted in a state court of theft by fraud in 1975, and in 1972 had consented to an SEC order forbidding him to violate federal securities laws in the offer and sale of stock in a corporation in which he had been involved. The government was permitted to present all these prior "bad acts" to the jury, and also to argue that Iles knew about Wardell's conviction and SEC bar order, though all Wardell had told her, when she informed him of her own SEC bar order, was that he, too, had had problems with the SEC.

Rule 404(b) of the Federal Rules of Evidence forbids the use of evidence of a defendant's history of illegal or unethical acts to prove that he is a person of bad character and

likely therefore to have committed the crime of which he is accused in the present case, or perhaps some other, undetected crime for which he should be punished. The government argues that it presented the evidence of Iles's and Wardell's bad acts for the innocent reason that those acts were so "inextricably intertwined" with the conduct of which the defendants were accused in this case that the jury needed to know the bad acts in order to form a complete picture of that conduct. *United States v. Spaeni*, 60 F.3d 313, 316 (7th Cir. 1995); *United States v. Ramirez*, 45 F.3d 1096, 1102-03 (7th Cir. 1995). Such evidence can be proper to enable the jurors to make sense of the evidence pertaining to the criminal activity of which the defendant is currently accused, *United States v. Gibson*, 170 F.3d 673, 682 (7th Cir. 1999), and to avoid puzzling them by making them think that facts important to their understanding of the case are being concealed. But those were not problems here. If the jurors never heard anything about Iles's and Wardell's previous legal troubles, it would not have occurred to them that they were missing anything or have made any of the other evidence in the case unintelligible.

The government's fallback position is stronger—that Iles's failure to disclose Wardell's and her histories was a part of the scheme. But the government overreaches by arguing that anyone who solicits an investment is required, on pain of criminal liability for failing to do so, to disclose any previous conviction for fraud, or for that matter anything else that might give an investor cold feet. If asked by the investor about such things, the solicitor would have to give a truthful answer or be guilty of fraud. E.g., *United States v. Tadros*, 310 F.3d 999, 1006 (7th Cir. 2002); *United States v. Ross*, 77 F.3d 1525, 1543 (7th Cir. 1996); *United States v. Kinney*, 211 F.3d 13, 17-19 (2d Cir. 2000). But to fail to volunteer such information would be fraud only if potential

investors would assume that someone soliciting an investment would disclose such a history. We doubt that that would be a reasonable assumption, and in any event the government has made no effort to argue that it would be or to provide cases that support its expansive notion of fraud.

It is true that a fiduciary (which Iles was, as we'll see when we come to the sentencing issues) is required to disclose facts material to his principal, e.g., *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547-48 (7th Cir. 1996); *United States v. Szur*, 289 F.3d 200, 211-12 (2d Cir. 2002), and true too that materiality implies merely that disclosure would make a difference to the principal's decision, *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 180 (2d Cir. 2001), and that most principals if they learned that their fiduciary had been convicted of fraud would tell him to take a walk. But pushed to its logical extreme, this reasoning would have required Iles to preface every conversation with a customer with a detailed recitation of everything in her personal history that might alarm or discourage him, on pain of criminal punishment if she intentionally left something out. It would also make a person who had ever been convicted of fraud a leper in the investment business, even if she had not been barred from the industry.

We need not pursue this issue; for what is incontestable is that Iles's history is evidence that the representations she made to potential investors really were misleading. She had represented to them that she was both reputable and experienced, and by doing so had implied that she had a clean record, and certainly that she had not been barred from the securities business for life almost a decade earlier, after being convicted of criminal fraud. What made the representation misleading was precisely her history; that

history was therefore direct evidence of guilt rather than evidence merely of bad character. *United States v. Polichemi*, 219 F.3d 698, 709-10 (7th Cir. 2000).

The judge should not, however, have permitted the evidence of Wardell's legal troubles to come in without evidence that Iles actually knew about them. All Wardell told her was that he had had problems with the SEC. Many members of the securities business have had problems with the SEC that did not result in their being barred from the business. The SEC does not bring remedial proceedings against everyone whom it investigates and it does not prevail in all the proceedings that it does bring. Anyone who had to defend himself against the agency would acknowledge having had problems with it even if he had been exonerated. The judge's error, however, was harmless, because the evidence against Iles, especially in light of our conclusion that her own previous fraud judgments were properly placed before the jury, was compelling.

Defendant Paladino complains that he was forced to take the stand by an erroneous evidentiary ruling. He had been deposed years earlier in an SEC proceeding, and in the criminal trial the judge allowed the government to present a severely cropped version of the deposition in an effort to demonstrate his guilty knowledge. Some of the deletions were required in order to protect the rights of the other defendants, see *Bruton v. United States*, 391 U.S. 123 (1968), but not all. An issue of great importance to Paladino's guilt or innocence was whether he knew that money in a certain account was money of investors ("invested money" or "investment money")—which as soon as it was received was checked out to him and the other defendants without ever being invested—or proceeds of legitimate transactions ("trade money"). Asked at the deposition about his knowledge of the invested money, he said: "I learned that this

money that's been coming in was investment money, and I was totally surprised because I assumed this whole time that this was trade money." The government put a period after "investment money" and deleted the rest of Paladino's answer. The difference between "I learned" and "I was surprised to learn" is subtle but potentially important; if Paladino wasn't surprised to learn that investor money was being misapplied, this would suggest that he had previous knowledge of the fraud, which he denied.

There were other harmful deletions. For example, handed during his deposition a "secured investor program agreement," Paladino said it "looks familiar" but added that he hadn't seen it until after the scheme had ended and the SEC had filed suit. The judge allowed the government to delete the addition even though, since Paladino's guilt depended on what he knew when, the date on which he first saw the document was crucial.

In permitting the government to make this and other misleading deletions, the trial judge violated Fed. R. Evid. 106, which provides, so far as bears on this case, that when one party introduces in evidence a part of a writing, his opponent "may require the introduction . . . of any other part . . . which ought in fairness to be considered contemporaneously with it." See *United States v. Glover*, 101 F.3d 1183, 1189 (7th Cir. 1996); *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981); *United States v. Burns*, 162 F.3d 840, 852-53 (5th Cir. 1998); *United States v. Sutton*, 801 F.2d 1346, 1368-70 (D.C. Cir. 1986). But the judge's error cannot help Paladino. He took the stand and could if he had wanted read to the jury the parts of the deposition that the government had suppressed. Cf. *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993); *United States v. Sweiss*, 814 F.2d 1208, 1212 (7th Cir. 1987). He did not do this; instead he simply testified to his understanding of the documents about which the government had questioned him.

That was a tactical error. His testimony would have been more effective—in part because it would have demonstrated the government's mendacity—had he exposed the government's misleading editing. But as he had an opportunity to correct the record, he is left to argue only that he would not have taken the stand had he not been compelled by the trial judge's erroneous ruling (and erroneous it was) to rectify the government's misleading editing; he concludes that the ruling infringed his Fifth Amendment right not to be compelled to testify in his own defense. But the Supreme Court has held that there is no compulsion in such a case, since the defendant has the option of refusing to testify and instead, if he is convicted, of obtaining appellate correction of the erroneous evidentiary ruling and with it a new trial. *Luce v. United States*, 469 U.S. 38, 41-43 (1984); see also *Ohler v. United States*, 529 U.S. 753, 758-59 (2000); *United States v. Saunders*, 359 F.3d 874, 877-78 (7th Cir. 2004); *United States v. Wilson*, 307 F.3d 596 (7th Cir. 2002); *United States v. Burrell*, 963 F.2d 976, 991-92 (7th Cir. 1992); *United States v. Doyle*, 771 F.2d 250, 254-55 (7th Cir. 1985); *United States v. Bond*, 87 F.3d 695, 700-01 (5th Cir. 1996). The specific evidentiary error in *Luce* was improper impeachment with a prior conviction, but the principle is the same: "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify," 469 U.S. at 43; for "claim of improper impeachment with a prior conviction" read "claim of violation of Rule 106."

This rule puts the defendant to a hard tactical choice. But the alternative would be to give him two bites at the apple: testify, and try to win an acquittal; if that fails, appeal and get a new trial on the basis of the judge's ruling. *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991). The Supreme Court prefers the first of these unsatisfactory resolutions to the second, and we are bound.

The only other nonsentencing issues in the appeal by Paladino and his confederates have no possible merit. They are Paladino's complaint about a variance between indictment and proof; his due process claim, which is based on an instruction; and Law's complaint about the judge's refusal to sever his trial from that of his codefendants. We move on, therefore, to Peyton's appeal. He was convicted by a jury of being a felon in possession of a firearm, namely a revolver found under the driver's seat of his car. A police officer, testifying as an expert witness on fingerprint evidence, said he'd been unable to find any fingerprints on the gun that could be used to identify who might have touched it. In answer to a question by the prosecutor, he testified that it was common to be unable to find usable fingerprints "at a crime scene or on an object." After the completion of the direct and cross-examination of the officer, the judge asked him how many times he'd tried to find fingerprints on handguns, and the officer replied, "Over a hundred," whereupon the judge remarked: "Okay. Contrary to what we might see on TV, is it likely or not likely to find latent prints on handguns"—to which the officer answered that it was unlikely.

What this line of inquiry had to do with Peyton's guilt is obscure. That there was no fingerprint evidence meant simply that there was no fingerprint evidence. Had Peyton's fingerprints been found on the gun, this would have helped the government and if someone else's fingerprints had been found on the gun, this would have helped Peyton because he testified that others had access to his car. Since no fingerprints were found, neither side was helped; and we can't see what difference it makes whether failure to find fingerprints on a gun is common or uncommon. In fact it is extremely common: "successful development of latent prints on firearms is difficult to achieve. In reality, very few identifiable latent prints are found on firearms, a fact that

has been discussed in both literature and the judicial system." Clive A. Barnum & Darrell R. Klasey, "Factors Affecting the Recovery of Latent Prints on Firearms," *Prosecutor*, Jan./Feb. 1998, p. 32.

The issue, rather, is whether by seeking to clarify, and in fact reinforcing, the testimony of a government witness, the district judge signaled to the jury that he thought the defendant was guilty. Such signaling is improper. *United States v. Martin*, 189 F.3d 547, 553 (7th Cir. 1999); *Collins v. Kibort*, 143 F.3d 331, 336 (7th Cir. 1998); *United States v. Davis*, 285 F.3d 378, 381-82 (5th Cir. 2002); *United States v. Tilghman*, 134 F.3d 414, 416 (D.C. Cir. 1998). But since the question how often fingerprints are found on guns was of no actual relevance to Peyton's guilt, it is hard to believe that the jury was swayed, gratuitous though the judge's intervention was. In any event, the evidence of Peyton's guilt was conclusive, so the judge's error was harmless. Peyton admitted to the police that he had known the gun was in his car, and since he was driving the car he was in possession of the gun. The fact that, if he was believed, he had not placed the gun there was irrelevant. If someone hands you a gun and you put it in your pocket, you possess it; and it is the same here. See *United States v. Lane*, 267 F.3d 715, 718-19 (7th Cir. 2001); *United States v. Wetwattana*, 94 F.3d 280, 283-84 (7th Cir. 1996); *United States v. Garrett*, 903 F.2d 1105, 1110-11 (7th Cir. 1990); *United States v. Teemer*, 394 F.3d 59, 64 (1st Cir. 2005).

Turner was charged with possessing a revolver on January 30, 2003, in furtherance of a drug crime, and also with possessing a shotgun on the same day in furtherance of another drug crime. He received separate, consecutive sentences for the two crimes under 18 U.S.C. § 924(c), which punishes using or carrying a firearm "during and in relation to" a "crime of violence or drug trafficking crime." *United*

States v. Cappas, 29 F.3d 1187, 1190-91 (7th Cir. 1994), holds that the offense defined by that statute is actually the use of one or more guns during or in relation to a drug offense, so had Turner used two guns during one offense he would have been guilty of only one violation of section 924(c). See also *United States v. White*, 222 F.3d 363, 373-74 (7th Cir. 2000); *United States v. Taylor*, 13 F.3d 986, 992-94 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Smith*, 924 F.2d 889, 894-95 (9th Cir. 1991). But he was charged with two separate drug crimes, albeit committed on the same day, each involving a gun (different guns, though that is of no significance). In the morning, armed with a revolver, he sold crack to one person. In the afternoon, armed with a shotgun, he sold crack to another person. These were unquestionably separate drug offenses, and therefore his carrying of a gun during each of them constituted two violations of section 924(c). Compare *United States v. Cappas*, *supra*, 29 F.3d at 1190; *United States v. Johnson*, 977 F.2d 1360, 1376-77 (10th Cir. 1992); *United States v. Privette*, 947 F.2d 1259, 1262-63 (5th Cir. 1991). He complains that the instructions did not clearly require the jury to tie each gun to a different drug transaction. They indeed were unclear, but the evidence was unequivocal and so any error in the instructions was harmless.

Velleff raises only sentencing issues; and so it is to the sentencing issues presented by these consolidated appeals that we now turn. We begin with Paladino and his co-defendants. He was sentenced to 72 months in prison and also ordered to pay restitution of $11-plus million, as were his codefendants. Iles was sentenced to 78 months, Law to 84, and Benson and Peitz to 188. The government concedes that all these sentences violated the Sixth Amendment right to trial by jury in federal criminal cases, as interpreted in

Booker, because in all of them the judge had enhanced the sentences (for such aggravating circumstances as being an organizer of the fraudulent conspiracy or a supervisor of others involved in it, or abusing a position of trust) on the basis of facts not determined by the jury. The government contends, and we agree, that under the guidelines regime overthrown by *Booker* the sentences would have been lawful.

There are only two serious challenges to the enhancements. One is by Peitz, who claims that his trial lawyer gave him ineffective assistance by failing to argue that he should not be responsible for acts committed by his coconspirators within the scope of the conspiracy after he was expelled from it. The claim is premature, because there is no affidavit or other evidence from the lawyer indicating why he did not make the argument. He may well have had good tactical reasons. Without meaning to prejudice Peitz's claim should he choose to make it the basis of a motion under 28 U.S.C. § 2255, we remind him that a defendant who sets in motion a train of events foreseeably inflicting losses that in fact materialize cannot escape responsibility by quitting, let alone by being expelled from, the conspiracy. *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989); *United States v. Schweihs*, 971 F.2d 1302, 1323-24 (7th Cir. 1992); *United States v. Melvin*, 91 F.3d 1218, 1226-27 (9th Cir. 1996).

The issue is not whether reporting the conspiracy to the authorities is the only way of withdrawing from a conspiracy; it is merely one way. *United States v. Pandiello*, 184 F.3d 682, 687 (7th Cir. 1999); *United States v. Patel*, *supra*; *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.). The issue is the form of withdrawal that will limit a conspirator's liability for losses that his own activity made more probable. As we explained in the *Patel* case, "having set in motion a criminal scheme, a conspirator will not be permit-

ted by the law to limit his responsibility for its consequences by ceasing, however definitively, to participate. Such cessation may or may not be effective withdrawal in a lay sense, but this is one of those places where the law uses a word in a special sense. You do not absolve yourself of guilt of bombing by walking away from the ticking bomb. And similarly the law will not let you wash your hands of a dangerous scheme that you have set in motion and that can continue to operate and cause great harm without your continued participation." 879 F.2d at 294. By communicating his withdrawal to the other members of the conspiracy, a conspirator might so weaken the conspiracy, or so frighten his conspirators with the prospect that he might go to the authorities in an effort to reduce his own liability, as to undermine the conspiracy. Peitz neither informed on the conspiracy so that the government could apprehend the other conspirators and by doing so prevent it from inflicting the losses for which his own conduct had set the stage, nor took any other measure to weaken the conspiracy; and so he remained liable for foreseeable losses inflicted by the conspiracy after his expulsion.

The other challenge to an enhancement is by Iles, who contests the finding that she abused a position of trust. The finding is based on evidence that she invited potential investors to entrust her with their money, assuring them that it would be safe in her hands. By establishing a fiduciary relationship with them she acquired a position of trust that she abused, as in *United States v. Frykholm*, 267 F.3d 604, 612-13 (7th Cir. 2001).

Peyton was sentenced to 180 months in prison, the statutory minimum because of his recidivist status as determined by the trial judge. His only challenge to the sentence is that the facts underlying the determination of that status were found by the judge rather than by the jury, and the

challenge fails under *Harris v. United States*, 536 U.S. 545 (2002); cf. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The government cross-appealed, complaining about the judge's departing downward from the guidelines range of 235 to 293 months to the statutory minimum, but it later moved to withdraw the appeal and we granted the motion.

The district judge had departed downward on two grounds: that Peyton had provided impressive evidence of rehabilitation, during the year in which he was free on bail prior to his sentencing, by abstaining from alcohol, living amicably with his wife, holding a steady job, and counseling his children to avoid following in his criminal footsteps; and that his criminal history overstated his recidivist proclivities because most of his prior crimes had been committed during a single spree. The government argued in its cross-appeal that the facts did not justify such a departure from the guidelines range, and this may be correct (we need not decide) under the rules that prevailed when the guidelines were mandatory. But now we know that the guidelines are advisory, and so the question is whether, if the judge re-sentenced Peyton to 180 months on the same ground on which he based the original sentence, we would reverse on the ground that the 180-month sentence was unreasonable. Under the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short. The issue is academic, since the cross-appeal has been dismissed. But for future reference it is worth noting that there are cases in which one can be certain that the judge would not have given a different sentence even if he had realized that the guidelines were merely advisory.

Turner was sentenced to 613 months in prison. A substantial portion of the sentence was based on findings by the

judge, but not the jury, regarding the quantity of crack that he had sold and other circumstances of his crime. Velleff was sentenced to 430 months for robbery and for drug and gun offenses. Some of the time was due to a recidivist enhancement not affected by *Booker*, which did not overrule *Almendarez-Torres*, but some was based on mandatory provisions of the sentencing guidelines.

Had the judgments become final before the Supreme Court decided *Booker*, the defendants would be out of luck, because *Booker* is not retroactive. *McReynolds v. United States*, 2005 WL 237642 (7th Cir. Feb. 2, 2005); see also *Green v. United States*, 2005 WL 237204, at *1 (2d Cir. Feb. 2, 2005) (per curiam); *In re Anderson*, 2005 WL 123923, at *3-4 (11th Cir. Jan. 21, 2005). Had the defendants raised a *Booker* issue in the district court, we would review the resolution of the issue in the ordinary way. But because they failed to do so, and acknowledge that our review is for "plain error" only, we must decide whether the sentencing errors of which they complain were indeed "plain."

Since all the sentences were within the sentencing range that Congress had created for these defendants' conduct, the district judge could give them identical sentences today without violating the Sixth Amendment. The government argues that, since the defendants cannot prove otherwise, the judges' error in thinking themselves bound by the guidelines was not a plain error, and so we should affirm the sentences.

An error is plain, first of all, if it is clearly an error, and that criterion is satisfied in cases such as these after *Booker*. But it must also affect the defendant's "substantial rights" and, in addition, "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); see also *United*

States v. Young, 470 U.S. 1, 15-16 (1985); *United States v. Esterman*, 324 F.3d 565, 569-73 (7th Cir. 2003); *United States v. Nance*, 236 F.3d 820, 825-26 (7th Cir. 2000); *United States v. Brennan*, 395 F.3d 59, 71 (2d Cir. 2005). This last criterion is usually equated to causing a "miscarriage of justice," *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982); *United States v. Allen*, 390 F.3d 944, 947-48 (7th Cir. 2004); *United States v. Lechuga*, 994 F.2d 346, 351 (7th Cir. 1993) (en banc); *United States v. Bradley*, 390 F.3d 145, 152 (1st Cir. 2004), that is (in the context of the guilt phase of the criminal proceeding), to creating a substantial risk of convicting an innocent person, since such a conviction certainly challenges the fairness, integrity, and public reputation of judicial proceedings. The reason for the heavier burden of overturning a conviction or sentence when the defendant failed to advance the ground for his challenge in the district court is the prejudice to the government from having been deprived of an opportunity to meet the challenge, and the additional work piled on the district court of conducting further proceedings that would have been unnecessary had the defendant advanced his objection to conviction or sentence in a timely fashion.

The question is how much heavier the burden of overturning is. The difference between the "substantial rights" and "fairness, integrity, or public reputation" elements of the plain-error standard is not entirely clear. One possibility, suggested by *United States v. Olano*, 507 U.S. 725, 734-35 (1993), and the numerous cases that speak in terms of "miscarriage of justice," is that the first element merely requires prejudice, in the sense that the verdict might have been different, whereas the second requires confidence that if the error is not corrected the result will be intolerable, such as the conviction of an innocent person or subjecting a guilty person to an illegally long sentence. An error can be

prejudicial without being intolerable, because it might be apparent that a retrial or a resentencing would lead to the same result.

Johnson v. United States, supra, 520 U.S. at 468-70, the canonical modern statement of the plain-error standard, suggests that "substantial rights" may mean simply important rather than merely technical rights and that "fairness, integrity, and public reputation" may refer simply to prejudice, that is, the likelihood that the verdict, or sentence, challenged on appeal was actually affected by the error. Yet *United States v. Dominguez Benitez*, 124 S.Ct. 2333, 2339-41 (2004), tacks back toward the *Olano* approach. This difference in understandings of the plain-error standard, if more than verbal, might be important in some cases, but is not critical in the cases before us, for there may have been plain error here even under the more stringent reading, which requires proof of a miscarriage of justice in the sense that we have indicated.

We do not have a question of guilt or innocence; the defendants are guilty. The issue is the meaning of plain error in the context of an illegal sentence. The government's basic position is that if a sentence was legal before *Booker*, it cannot be plainly erroneous; because the guidelines remain valid, albeit demoted to being merely advisory, a sentence that complies with them would be very unlikely to be reversed. The argument rests on a misunderstanding of the difference between the guilt phase of a case and the punishment phase. Guilt is either-or; the defendant is either guilty or innocent. If an error is committed and the defendant is convicted, the appellate court has only to consider whether the defendant would probably have been acquitted had the error not occurred. If so—if the error may well have precipitated a miscarriage of justice (which the conviction of an innocent person is)—it is a plain error and the defendant is

entitled to a new trial. But sentencing is not either-or; it is the choice of a point within a range established by Congress, and normally the range is a broad one. There are exceptions, notably where the choice is between death and prison; then, as in *Jones v. United States*, 527 U.S. 373, 402-05 (1999), it may be feasible for the appellate court to determine that despite the error the choice would have been the same. Cf. *United States v. Cotton*, 535 U.S. 625, 633-34 (2002). That is not true here; here, unless any of the judges in the cases before us had said in sentencing a defendant pre-*Booker* that he would have given the same sentence even if the guidelines were merely advisory (which none of the judges did say), it is impossible for a reviewing court to determine—*without consulting the sentencing judge* (a pregnant qualification, as we are about to see)—whether the judge would have done that.

The government argues that if, as happened in several of the cases, the judge imposed a sentence higher than the guideline minimum, this shows that he wouldn't have imposed a lighter sentence even if he had known the guidelines were merely advisory. *United States v. Bruce*, 396 F.3d 697, 720 (6th Cir. 2005). We disagree. A conscientious judge—one who took the guidelines seriously whatever his private views—would pick a sentence relative to the guideline range. If he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high.

Even in cases in which there is a broad sentencing range, it may sometimes be possible for an appellate court to be confident that the sentencing judge would have given the sentence he did even if he had not misunderstood the legal effect of the guidelines. It would be the mirror image of Peyton's case, where we expressed confidence that the judge

would not have imposed a heavier sentence had he known the guidelines were not binding; for he gave Peyton a term of imprisonment that was not only four and a half years below the lowest point in the applicable guideline range but was the lightest sentence that the applicable statute permitted him to give. Similarly, if a judge were to impose a sentence at the statutory maximum and say that if he could he would have imposed an even longer sentence, there would be no basis for thinking that if he had known that the sentencing guidelines are merely advisory he would have given the defendant a lighter sentence.

But if as in the cases before us the sentencing judge might well have decided to impose a lighter sentence than dictated by the guidelines had he not thought himself bound by them, his error in having thought himself bound may have precipitated a miscarriage of justice. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. *United States v. Pawlinski*, 374 F.3d 536, 540-41 (7th Cir. 2004); *United States v. Newman*, 965 F.2d 206, 213 (7th Cir. 1992); *United States v. Syme*, 276 F.3d 131, 158 (3d Cir. 2002); *United States v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001); compare *United States v. Moyer*, 282 F.3d 1311, 1319 (10th Cir. 2002). As we said in *Pawlinski*, "the entry of an illegal sentence is a serious error routinely corrected on plain-error review." 374 F.3d at 541. To tell a defendant we know your sentence would have been 60 months shorter had the district judge known the guidelines were merely advisory, because he's told us it would have been—but that is your tough luck and you'll just have to stew in prison for 60 additional months because of an acknowledged violation of the Constitution—would undermine the fairness, the integrity, and the public repute of the federal judicial process. *United States v. Davis*, 2005 WL 334370, at *8 (3d Cir.

Feb. 11, 2005); *United States v. Ameline*, 2005 U.S. App. LEXIS 2032, at *18-20 (9th Cir. Feb. 9, 2005), amended, 2005 WL 350811, at *5-6 (9th Cir. Feb. 10, 2005); *United States v. Oliver*, 2005 WL 233779, at *8 (6th Cir. Feb. 2, 2005); *United States v. Hughes*, 396 F.3d 374, 381 (4th Cir. 2005). The sentencing phase of a prosecution is not to be taken lightly, as we know from *Glover v. United States*, 531 U.S. 198 (2001), where the Supreme Court rejected this court's holding in *Durrive v. United States*, 4 F.3d 548, 550-51 (7th Cir. 1993), that an error by counsel that resulted in a higher sentence for his client did not violate the right to effective assistance of counsel unless the higher sentence was unfair. See also *United States v. Adams*, 252 F.3d 276, 282-89 (3d Cir. 2001).

The equal and opposite error is to assume that every sentence imposed in violation of the Sixth Amendment and therefore of *Booker* is plainly erroneous and thus automatically entitles the defendant to be resentenced. That is the error committed by the Sixth Circuit in *United States v. Oliver*, *supra*, at *8, and the Fourth Circuit in *United States v. Hughes*, *supra*, 396 F.3d at 380-81. What these courts overlooked is that if the judge would have imposed the same sentence even if he had thought the guidelines merely advisory (in which event there would have been no Sixth Amendment violation), and the sentence would be lawful under the post-*Booker* regime, there is no prejudice to the defendant.

The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge. We agree, therefore, with the Second Circuit's ruling in *United States v. Crosby*, 2005 WL 240916, at *11 (2d Cir. Feb. 2, 2005), that what an appellate court should do in *Booker* cases in

which it is difficult for the court to determine whether the error was prejudicial is, while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence. See also *United States v. Williams*, 2005 WL 425212 (2d Cir. Feb. 23, 2005). If so, we will affirm the original sentence against a plain-error challenge provided that the sentence is reasonable, the standard of appellate review prescribed by *Booker*. 125 S. Ct. at 765. The proviso is important; the mere reimposition of the original sentence does not insulate it from appellate review under the new standard.

If, on the other hand, the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were merely advisory, we will vacate the original sentence and remand for resentencing. In formulating the statement (whether the judge's conclusion is that he would, or would not, adhere to the original sentence), "the District Court should obtain the views of counsel, at least in writing, but 'need not' require the presence of the Defendant, *see* Fed.R.Crim.P. 43(b)(3). Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence, with an appropriate explanation," *United States v. Crosby*, *supra*, at *13, or inform this court of its desire to resentence the defendant. (By "should" in the quoted passage we understand "must.") We will then vacate the sentence and, "with the Defendant present, [the district court shall] resentence [the defendant] in conformity with the SRA [and] *Booker/Fanfan*, . . . including an appropriate explanation, *see* § 3553(c)." *Id.*

Our procedure is not identical to that set forth in *Crosby*, though it is very close. *Crosby* envisages the district judge as vacating the original sentence if the judge wants to resentence

the defendant. Under our procedure, since we retain jurisdiction throughout the limited remand, we shall vacate the sentence upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory.

The Sixth Circuit, in *United States v. Milan*, 2005 WL 309934 (6th Cir. Feb. 10, 2005), rejected *Crosby* on the ground that the Supreme Court in *Booker* had remanded the case for resentencing. But in so ruling the Sixth Circuit overlooked the fact that the government had waived the argument that Booker's appeal was governed by the plain-error standard, as we had noted in our decision in *Booker*, which the Supreme Court affirmed. *United States v. Booker*, 375 F.3d 508, 515 (7th Cir. 2004). The Supreme Court made no ruling, express or implied, on the proper standard of plain-error analysis in cases such as this.

The Eleventh Circuit, while agreeing with the Second that it is impossible for a reviewing court to know what sentence a district judge would have given had he known the guidelines were merely advisory, concluded that this means that a defendant in such a case cannot show that his substantial rights have been affected; cannot, therefore, establish plain error. *United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005). Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence. *Crosby* is the middle way between placing on the defendant the impossible burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines mandatory and requiring that all defendants whose cases were pending when *Booker* was decided are entitled to be

resentenced, even when it is clear that the judge would impose the same sentence and the court of appeals would affirm.

To summarize, we affirm all the convictions and Peyton's sentence, but we direct a limited remand of the remaining sentences in accordance with the procedure set forth above, thus retaining appellate jurisdiction.

Because this opinion establishes a new rule for the circuit, it was circulated to the entire court before issuance. 7th Cir. R. 40(e). All but two members of the court in regular active service voted not to hear the case en banc. Judges Ripple and Kanne voted to hear it en banc.

RIPPLE, *Circuit Judge*, dissenting from the denial of rehearing en banc. In the few short weeks since the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the courts of appeals across the Country have produced a significant number of opinions setting forth a broad spectrum of approaches designed to implement the Supreme Court's decision. The panel opinion before us sets forth the holdings of the first generation of those various cases and then presents a variation of one. Today's panel opinion thus initiates the second generation of post-*Booker* opinions, variations on the themes set forth in the first generation of opinions. No doubt, before the vernal equinox arrives, these second generation opinions will produce a further variation and a third generation of opinions will be

upon us. Complexity will complicate complexity. The companies that produce the reports of our opinions will be delighted; the notes and comments editors of the Nation's law reviews will have sufficient fodder for all of next year's crop of aspiring editors—and the federal courts will raise serious doubts about their capacity to govern.

Is this the course that the Supreme Court expected would follow its pronouncement in *Booker*? Are we to attribute to the Court a desire that the Nation's intermediate courts of appeals develop elaborate and diverse approaches to *Booker*'s holding? There are, no doubt, times when a Supreme Court decision is intended to encourage intermediate appellate courts to address unresolved issues and for the intermediate courts' resolutions of those issues to percolate to the Supreme Court. But the situation presented by *Booker* is hardly one. The entire federal criminal justice system came to a standstill in anticipation of the Court's decision in *Booker*. Now that the Court has ruled, it is time to implement its decision—immediately and forthrightly.

As a threshold matter, then, we ought to pause and reflect on the reason for this plethora of diverse approaches, churned out by the courts at a pace that obviously has precluded the sort of reflection and open collegial consultation that ought to be part and parcel of the process of deciding an appellate case.

One possible reason for such a judicial behavior pattern would be the novelty of the Supreme Court's decision. However, we are not confronted with such a once-in-a-century situation. The situation before us is not unique: We simply must implement a decision that holds that the sentencing procedure employed in the federal courts is unconstitutional because it denies the right to a jury trial. We are asked to see that individuals illegally sentenced to prison are relieved of the burden of serving a sentence imposed under such an unconstitutional system.

In my view, the approach formulated by the panel suffers from two basic infirmities. First, as Judge Kanne convincingly points out, the abbreviated "quick look" required of a district court is hardly a substitute for the sentencing process that the Supreme Court now has said is mandated by our Constitution. Until the district court undertakes a new sentencing process—cognizant of the freedom to impose any sentence it deems appropriate as long as the applicable guidelines range and the 18 U.S.C. § 3553(a) factors are considered—the district court cannot accurately assess whether and how its discretion ought to be exercised. The panel's holding requires the court to pre-judge and to pre-evaluate evidence it has not heard. Sentencing after *Booker* will raise subtle issues as to how much emphasis ought to be given to particular facts and circumstances. This task can be accomplished competently only after hearing witnesses and seeing the evidence. In short, what the panel substitutes for the usual judicial reaction to an unconstitutionally-imposed sentence is a process that simply is inadequate to the task.

In all too many instances, the process scripted by the panel will serve as an invitation for the district court to give only a superficial look at the earlier unconstitutionally-imposed sentence. The constitutional right at stake hardly is vindicated by a looks-all-right-to-me assessment by a busy district court. Indeed, *if* we wanted to drag our collective judicial feet and ensure that the Supreme Court's decision had minimal impact (a motivation I certainly do *not* attribute to my colleagues), it would be difficult to come up with a better device than the one crafted by the panel opinion.[1]

In addition to mandating an enfeebled mechanism for the correcting of the unconstitutional process identified by the

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[1] *Cf. United States v. Williams*, No. 04-2882, slip op. at 16 (2d Cir. Feb. 23, 2005) (defending a truncated procedure partially on the ground that it avoids administrative burdens).

Supreme Court, the panel opinion also has introduced into our decisions a new rigidity with respect to our formulation of the plain error doctrine—a rigidity that I fear my colleagues will regret long after the "*Booker* cases" are a faded memory.

The Supreme Court has recognized that "[n]ormally, *although perhaps not in every case*, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *United States v. Olano*, 507 U.S. 725, 735 (1993) (emphasis supplied). However, we have never required this specific showing of prejudice in circumstances in which the error has denied the defendant a constitutionally-mandated process and when the outcome of that process cannot be known until the process actually takes place. Rather, in such contexts, we have ordered resentencing when a distinct possibility exists that the error influenced the district court's selection of a particular sentence. For instance, we have remanded sentences that fell in the overlap of an erroneously applied sentencing range and the correct guidelines range, " 'unless we have reason to believe that the error did not affect the district court's selection of a particular sentence.' " *Emezuo v. United States*, 357 F.3d 703, 711 (7th Cir. 2004) (quoting *United States v. Wallace*, 32 F.3d 1171 (7th Cir. 1994)); *see United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002) (relaxing the otherwise rigorous plain error review standards to correct unobjected error because the error related to sentencing and the defendant lacked prior knowledge that the erroneous sentencing condition would be imposed); *United States v. Plaza-Garcia*, 914 F.2d 345, 347-48 (1st Cir. 1990) (vacating sentence under the plain error doctrine that fell within incorrect and correct guidelines range because the sentence "may well have been influenced by the [erroneous] sentencing recommendation"); *see also United States v. Reyna*, 358

F.3d 344, 351 (5th Cir. 2004) (presuming prejudice when the district court failed to allow defendant to allocute because of the nature of the right and the difficulty of proving the violation affected a specific sentence); *United States v. Adams*, 252 F.3d 276 (3d Cir. 2001) (same).

The panel decision today offers a superficially pragmatic, but not a principled, basis for adopting its novel approach to plain error analysis. Particularly troubling, in terms of its long-term impact, is the delegation to the district court of *our* judicial responsibility to evaluate plain error on an independent basis. *See United States v. Domiguez Benitez*, 124 S. Ct. 2333, 2340 (2004) ("A defendant must thus satisfy the judgment *of the reviewing court* . . . .") (emphasis added). Indeed, even when viewed as a "pragmatic" response to *Booker*'s mandate, the panel's hastily constructed procedure falls on its own sword. The panel never tells us what it plans to do with cases in which retirement, disability or death has made impossible consultation with the district judge who imposed the unconstitutional sentence. Even when such consultation is possible, our case tracking computer programs will get quite a workout, and we certainly shall see another New Year come and go before this situation no longer impedes our regular work. The Supreme Court has told us that one of the reasons for plain error review is to reduce the burden on the judicial system. *See Johnson v. United States*, 520 U.S. 461, 468 (1997). It is indeed difficult to see how the odyssey on which the panel now sends us will do anything other than tie us in knots.[2]

Booker requires a simple, direct remedy to those harmed by the unconstitutional procedure of former times. We would

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[2] *Cf. Williams*, slip op. at 20 n.15 (criticizing the procedure scripted by the panel opinion as introducing a "needless yo-yoing between the appellate court and the district court").

best serve justice by implementing the Supreme Court's mandate quickly and efficiently. I respectfully dissent.

KANNE, *Circuit Judge*, dissenting from the denial of rehearing en banc. I concur with all aspects of the panel's opinion issued today—except for the proposed mechanism to remedy the unconstitutionally imposed sentences. I believe that the sentences must be vacated and remanded to the district courts for resentencing in light of *Booker*.

In *Booker*, the Supreme Court stated that enhancements resulting from judge-found (rather than jury-found or admitted) facts violate the Sixth Amendment. 125 S. Ct. at 755-56. Importantly, Booker's companion petitioner, Fanfan, had received a sentence that did not violate the Sixth Amendment but was nonetheless deemed unconstitutional because it was imposed under a mandatory Guidelines regime. *Id.* at 768. *Any* sentence handed down under a mandatory guideline regime is unconstitutional. The solution selected by the panel (a limited remand, simply asking the district judge whether there was a "miscarriage of justice") does not fully rectify this problem.

In the post-*Booker* world, sentencing judges have discretion to weigh a multitude of factors that were not ordinarily relevant or appropriate to consider under the previous regime. *See, e.g.*, U.S.S.G. § 5H1 (specific offender characteristics including age, family ties and responsibilities, and employment record). These are the very factors that might

convince a judge to resentence. The panel's limited remand leaves open the possibility that these factors might come to light in a hearing conducted by the district court, but there is no guarantee that such a hearing will be held—and if we retain jurisdiction as the panel would have it, it is unclear that a district judge could even compel such a hearing.

Certainly, we can anticipate that some district judges will opt not to have a hearing and simply choose not to resentence, at which point we may be required to review the standing sentence for reasonableness. But surely reasonableness depends not only on the length of the sentence but on the process by which it is imposed. The record in the case in which there was no resentencing (or hearing on the issue) will be impossible for us to review for reasonableness, if reasonableness is to be determined with regard to all of the "the numerous factors that guide sentencing." *See Booker*, 125 S. Ct. at 765-66. We know now that the universe of factors that guides sentencing is larger than it was pre-*Booker*, and defendants should have the opportunity to argue these factors in a full resentencing hearing and have them reflected in the record. It is the only way to know whether a different sentence would have been imposed under advisory guidelines. To deny defendants this opportunity is a "miscarriage of justice" and thus is necessarily plain error.

Therefore, the necessary approach is to vacate all the sentences so that new ones are imposed in accord with *Booker*—constitutionally, under an advisory Guideline system—that would allow the judge to exercise discretion in sentencing. This is the approach that has been adopted by the Fourth, Sixth, and Ninth Circuits. *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); *United States v. Ameline*, No. 02-30326, 2005 WL 350811 (9th Cir. Feb. 10, 2005); *United States v.*

Milan, 398 F.3d 445 (6th Cir. 2005). I read the panel's approach as an ad hoc procedure through which the district court can elect not to exercise its sentencing discretion as *Booker* requires. It is hard to see how, without a hearing and briefing tantamount to resentencing by normal vacatur and remand procedures, a district court could ever give "an appropriate explanation" for its decision not to resentence. If a district judge chooses not to resentence (especially without a hearing), that judge is effectively letting stand a sentence imposed under an unconstitutional regime.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 23, 2005

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Nos. 03-2296 & 03-2383-86

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* ROBERT D. PALADINO, et al., *Defendants-Appellants*.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 01 CR 852 William T. Hart, *Judge*.

ORDER

We ordered a limited remand to ask whether the district judge, had he known the sentencing guidelines were advisory, would have imposed the same sentence on Robert Paladino, Daniel Benson, Monica Iles, Randall Law, and Frank Peitz. *See*

United States v. Booker, 125 S.Ct. 738 (2005); *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005). The judge answered that he would have imposed the "same total sentences of incarceration." He went on to explain, however, that at sentencing he erroneously assumed a 30-year statutory maximum for the wire fraud counts on which each defendant was convicted, *see* 18 U.S.C. §1343. Since the crimes did not affect a financial institution and took place before the statute was amended in 2002, the correct maximum in each case was five years. *See id.*; *United States v. Baldwin*, 414 F.3d 791, 794 (7th Cir. 2005). Yet the judge imposed on each **2 defendant eight concurrent terms exceeding five years for those counts. As the court now realizes, it should have structured the defendants' overall punishment by imposing five year terms and making the sentences partially consecutive to achieve the same bottom line. *See* U.S.S.G. §5G1.2(d); *Baldwin*, 414 F.3d at 794, 797; *United States v. Noble*, 299 F.3d 907, 909 (7th Cir. 2002). Furthermore, incorrectly applying the 30-year maximum also resulted in excessively long terms of supervised release for each defendant but Iles. Iles got three years' supervised release, the maximum; the others got five, two years longer than the maximum. *See* 18 U.S.C. §§ 3559 (a)(4), 3583(b)(2); U.S.S.G. §5D1.2(a)(2). The judge explains in his response to our limited remand that he would fix these mistakes if we remanded for him to do so.

We invited the parties to respond, but only the government, Paladino, and Iles did. For its part, the government concedes that the sentences are illegal, yet it asks that we affirm all but Peitz's because he alone raised the issue of the statutory maximum on appeal. Waiver, however, is circumscribed in the case of a sentence above the statutory maximum. *United States v. Bownes*, 405 F.3d 634, 637 (7th Cir. 2005) (citing cases). And the error in such a case is plain. *United States v. Gibson*, 356 F.3d 761, 766-67 (7th Cir. 2004). In any event, we will not affirm sentences unless they are

reasonable, *Paladino*, 401 F.3d at 484, and cannot conclude that these illegal sentences meet that standard. What's more, there is no economy in affirming now only to have these sentences immediately challenged under 28 U.S.C. §2255.

Therefore, we VACATE each defendant's sentence in appeal numbers 03-2296, 03-2383, 03-2384, 03-2385, and 03-2386 and REMAND so that each sentencing "package" can be properly structured and the terms of supervised release corrected. *See Noble*, 299 F.3d at 910. Nonetheless, it's worth noting that once the mistakes are fixed on remand, the overall sentencing package in each case would be presumptively reasonable since each was properly calculated under the guidelines. *See United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). The defendants have offered nothing to rebut that presumption.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 01 CR 852
	)	(On limited remand
FRANK L. PEITZ, DANIEL B.	)	from the United
BENSON, ROBERT D.	)	States Court of
PALADINO, RANDALL W.	)	Appeals for the
LAW, and MONICA M. ILES,	)	Seventh Circuit.
	)	Appeal Nos. 03-2296,
Defendants.	)	03-2383-86)

MEMORANDUM OPINION AND ORDER

I.

Following a jury trial, defendants Frank Peitz, Daniel Benson, Robert Paladino, Randall Law, and Monica Iles were found guilty on all counts but one. All were found guilty of eight substantive counts of wire fraud in violation of 18 U.S.C. §1343. Defendants Peitz, Benson, and Paladino were found guilty of a conspiracy in violation of 18 U.S.C. §1956(h) under which they agreed to (1) engage in wire fraud violations that were designed to conceal the source and ownership of unlawful proceeds in violation of 18 U.S.C. §1956(a) and (2) engage in monetary transactions in criminally derived property with a value greater than $10,000 in violation of 18 U.S.C. §1957(a). Peitz, Benson, and Paladino were also found guilty of four substantive money **2 laundering counts on violating 18 U.S.C. §1957 and two substantive money laundering counts of violating 18 U.S.C. §1956(a)(1)(B)(I). The scheme in which

defendants were involved resulted in investors losing approximately $11,000,000. A receiver appointed at the request of the Securities and Exchange Commission was able to recover only $860,000.

All defendants except Benson objected to the Sentencing Guidelines calculations contained in the presentence reports ("PSR"), defendant Paladino moved for a downward departure, the government raised objections as to each PSR, and the government moved for upward departures as to each defendant. Following a hearing on the various sentencing issues, the court determined the applicable sentencing ranges and denied all departure requests. See United States v. Peitz, 2003 WL 1964241 (N.D.Ill. April 25, 2003) (summarizing rulings made at the hearing). The Sentencing Guidelines range for each defendant and custody and supervised release term actually imposed on each defendant were as follows.[1] With a Guidelines range of 168-210 months, Peitz was sentenced to 188 months' incarceration to be followed by 5 years' supervised release on the money laundering counts to run concurrently. With a Guidelines range of 151-188 months, Benson was sentenced to 188 months' incarceration to be followed by 5 years' supervised release on the wire fraud counts and three years supervised release on the money laundering counts to run **3 concurrently. With a guidelines range of 70-87 months, Paladino was sentenced to 72 months' incarceration to be followed by 5 years' supervised release on the wire fraud counts and three years supervised release on the money laundering counts to run concurrently. With a Guidelines range of 78-97 months, Law was sentenced to 84 months' incarceration to be followed by 5 years' supervised release. With a Guidelines range of 78-97 months, Iles was sentenced to 78 months'

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[1] The sentences for each count were concurrent with each other. Law's sentence was consecutive to a state sentence he was already serving.

incarceration to be followed by 3 years' supervised release. Peitz, Benson, and Paladino were ordered to pay $11,419,970 in restitution. Law and Iles were ordered to pay $11,109,970 in restitution. The sentence were imposed on April 30, 2003, before the Seventh Circuit or Supreme Court held that the Sentencing Guidelines were unconstitutional is treated as mandatory and based on factual findings made by the court. See United States v. Booker, 375 F.3d 508 (7th Cir. 2004), aff'd & remanded, 125 S.Ct. 738 (2005). See also Blakely v. Washington, 542 U.S. 296 (2004).

On direct appeal, the Seventh Circuit affirmed the convictions of all five defendants. United States v. Paladino, 401 F.3d 471, 474-77 (7th Cir. 2005). Two challenges to the Guideline calculations were denied. See id. At 478-80. The Seventh Circuit, however, ordered a limited remand for the purpose of determining whether this court would have imposed a different sentence had it been known, in light of the Supreme Court's decision in Booker, that the Guidelines were not mandatory. See Paladino, 401 F.3d at 481-85.

Following the remand from the Seventh Circuit, the parties submitted briefs addressing the questions of whether, in **4 light of Booker, any defendant should receive a different sentence. Defendants themselves were not brought before the court, but defendants themselves were permitted to submit letters to the court and counsel were permitted to make oral presentations in support of their written arguments. Such a procedure is consistent with the Paladino decision. See Paladino, 401 F.3d at 484 (quoting United States v. Crosby, 397 F.3d 103, 120 (2d Cir. 2005)). Defendants were permitted to proffer any additional evidence that they might desire to submit. The government argues that the decision as to whether a different sentence would have been imposed should be limited to evidence that was before the court at the time of the original sentencing. The court has not so limited the defendants. If this

court indicates that it would impose a different sentence, the existing sentence will be vacated and a new sentencing hearing will be held. Such a hearing would not be limited to information and evidence previously before the court. Also, there may be information that is relevant post-Booker, but which defendants did not previously submit because not relevant to Guidelines sentencing. In any event, defendants apparently have not proffered any new information or evidence other than their personal appeals that make some reference to post-incarceration conduct and changes of heart. All the information and arguments that have been submitted will be considered.

II.

Before turning to the particulars of each defendant, one general issue will be addressed. The parties dispute the role **5 that the Guidelines should play under the post-Booker regime. Defendants contend the Guidelines are just one of many factors to consider under 18 U.S.C. §3553(a). Cf. United States v. Ranum, 353 F.Supp.2d 984, 986-87 (E.D. Wis. 2005). The government contends that the Guidelines range should still be applied unless unusual or exceptional circumstances exist for imposing a sentence outside the Guidelines range. Cf. United States v. Wilson, 350 F.Supp.2d 910, 912, reconsideration denied, 355 F.Supp.2d 1269 (D. Utah 2005).

In Booker, the Supreme Court held that, absent a defendant's waiver of factfinding by a jury, it would be unconstitutional to apply mandatory Sentencing Guidelines ranges determined in whole or in part by factual findings made by a judge. Booker, 125 S.Ct. at 748-56. To avoid a constitutional infirmity, the Supreme Court severed and excised the provision of the Guidelines (18 U.S.C. § 3553(b) (1)) that required sentencing courts to impose a sentence within the applicable Guidelines range (absent adequate grounds for

departure). Booker, 125 S.Ct. at 764. Following Booker, facts affecting the statutory sentencing range still must be proved beyond a reasonable doubt or be admitted by the defendant (in a plea agreement or otherwise). Facts establishing the nonmandatory Guidelines sentencing range may still be found by the sentencing court by a preponderance of the evidence. McReynolds v. United States, 397 F.3d 479, 481 (7th Cir.), cert. denied, 125 S. Ct. 2559 (2005); United States v. Smith, 359 F.Supp.2d 771, 773 (E.D.Wis. 2005). The Sentencing Guidelines are not mandatory and the sentencing court retains authority to sentence within the **6 applicable statutory range. Booker, 125 S.Ct. at 765-67; United States v. Schlifer, 403 F.3d 849, 853 (7th Cir. 2005). "As a practical matter, . . . sentences would be determined in the same way [as before Blakely and Booker] the only change would be the degree of flexibility judges would enjoy in applying the guideline system." McReynolds, 397 F.3d at 481.

Booker did not hold the provisions of 18 U.S.C. §3553(a) to be unconstitutional. In exercising its discretion, the sentencing court must take into consideration the factors set forth in §3553(a). That statute includes the overall guide that the sentence imposed be "sufficient, but not greater than necessary, to comply with the purposes set forth in" §3553(a)(2). Subsection (a)(2) provides that the court shall consider:

> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

18 U.S.C. §3553(a)(2). Other factors listed in §3553(a) are the nature and circumstances of the offense and the history and characteristics of the defendant; the kinds of sentences available; the Guidelines ranges and options; Guidelines policy statements; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims of the offense.

** 7 In United States v. Dean, ___ F.3d ___, 2005 WL 1592960 (7th Cir. July 7, 2005), the Court of Appeals for the Seventh Circuit recently provided guidance for the application of factors in §3553(a) and sentencing within and outside the Sentencing Guidelines range. See also United States v. Mykytiuk, ___ F.3d ___ 2005 WL 1592956 (7th Cir, July 7, 2005).

> Section 3553(a), unlike the guidelines themselves after Booker, is mandatory. United States v. Booker, supra, 125 S.Ct. at 764-65. The sentencing judge cannot, after considering the factors listed in that statute, import his own philosophy of sentencing if it is inconsistent with them. And therefore he can, as a matter of prudence, unbidden by either party, do what Dean wants him to do--write a comprehensive essay applying the full panoply of penological theories and considerations, which is to say everything invoked or evoked by section 3553(a)--to the case before him.
>
> But that is not required; like Chief Judge

Randa in the present case, the sentencing judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant. United States v. Hadash, 408 F.3d 1080, 2005 WL 1250331, at *3 (8th Cir. May 27, 2005); United States v. Mares, 402 F.3d 511, 518-20 (5th Cir. 2005). "Judges need not rehearse on the record all of the considerations that 18 U.S.C. §3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less." United States v. George, 403 F.3d 470, 472-73 (7th Cir. 2005). This shortcut is justified by the indeterminate and interminable character of inquiry into the meaning and application of each of the "philosophical" concepts in which section 3553(a) abounds.

* * *

Our focus thus far has been on cases in which the sentencing judge is minded to impose a sentence outside the guidelines range. Recognizing that the guidelines are promulgated **8 and continually revised by an agency staffed by experts (the Sentencing Commission), the court in United States v. Mares, supra, 402 F.3d at 519, said that "if the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the

> Guidelines . . . . When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required." But the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory. Simon v. United States, 361 F.Supp.2d 35, 39-41 (E.D.N.Y. 2005); United States v. Kelley, 355 F.Supp.2d 1031, 103-37 (D. Neb. 2005); United States v. Ranum, 353 F.Supp.2d 984, 985-86 (E.D. Wis. 2005).

Dean, 2005 WL 1592960 at *4-5.

The sentencing range as determined under the Guidelines will be the starting point for imposing a sentence. Possible departures under the Guidelines must also be considered. In the present case, the sentencing ranges have already been established[2] and it has already been determined that no grounds for a Guidelines departure exist. Therefore, as to each defendant, it must be considered whether good reason exists to impose a sentence outside the Guidelines range. It must be considered whether the generalized and necessarily

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[2]Peitz points to an error regarding a statutory maximum with respect to the wire fraud counts and the government concedes there was error. That issue is separately addressed in § III infra.

imprecise and **9 limited Guidelines failed to result in an adequate implementation of §3553(a)'s purposes and factors as regards each individual defendant under consideration.

In determining whether good reason exists to impose a sentence outside the Guidelines sentencing range, the particulars of the defendant's crime and background will have to be considered. In most cases, the Guidelines will adequately take these factors into account. In some cases, they will not. Additionally, when considering whether good reason exists to sentence outside the Guidelines range, the court will have greater latitude to consider the personal characteristics of the defendant than are available under the Guidelines.

III.

The substantive wire fraud and money laundering counts in this case occurred in 1996 and 1997. Peitz was sentenced to 188 months' incarceration on each of eight wire fraud counts, the conspiracy count, and the two §1956 counts, and 120 months' incarceration on each of the four §1957 counts, all to run concurrently. Peitz complains that this was improper in that, as of 1997, the maximum sentence for a wire fraud conviction was 5 years' incarceration (cumulatively 40 years) unless the violation affected a financial institution. If the violation affected a financial institution, the maximum statutory sentence was 30 years' incarceration (cumulatively 240 years). See 18 U.S.C. §1343 (1997). However, affecting a financial institution was not charged or found by the jury. The government concedes that the statutory maximum for each wire fraud count was 5 years. **10 Having a 30-year statutory maximum would also have been the basis in this case for imposing a 5-year period of supervised release based n a Class A felony instead of the 3-year period for a Class D felony. See 18 U.S.C. §§3581(b), 3583(b); U.S.S.G. § 501.2(a). The PSR's for each of the defendants assumed the statutory maximum for the wire fraud charges was 30 years (and

the defendants' conduct did adversely affect a financial institution). No defendant nor the government raised this error prior to sentencing. For each defendant, the sentence on each wire fraud charge exceeded the 5-year maximum and every defendant except Iles received a sentence that included five years' supervised release. Apparently, the only defendant to raise this issue on appeal was Peitz, who contended it was plain error. The government conceded it was error, but argued it was harmless because 188 months' incarceration was imposed on the §1956 money laundering counts also (which have a 20-year maximum for each count). The government did concede that Peitz's supervised release should have been only 3 years. The Seventh Circuit did not address this issue on appeal. See Paladino, 401 F.3d at 479-80. However, the only issue before this court on the limited remand is whether a different sentence would have been imposed had this court known the Guidelines are not binding.

Peitz now argues that his Guidelines sentencing range is incorrect because it incorrectly assumes a 30-year maximum for the wire fraud charges. His sentencing range was based on a total offense level of 35 for the wire fraud charges. The total offense level for the money laundering charges was 34. Peitz, 2003 WL 1964241 at *1. He contends that the wire fraud ** 11 sentencing range should have been limited to a maximum 60 months and that he instead should have been sentenced based on the 34 total offense level, which would have been a 151-188 month sentencing range. Peitz's contention is incorrect. If he had been convicted on only one count of wire fraud and no other offense, his sentencing range would be 60 months. See U.S.S.G. §5G1.l(a). A different rule applies to convictions on multiple Counts. Assuming there are sufficient counts to reach the sentencing range without violating the statutory maximum for individual counts, the applicable Guideline sentencing range is still calculated the same, but applied by stacking consecutive sentences. See id. §5G1.2(d). In Peitz's case, the 188-month

sentence could have been reached by imposing three consecutive terms of 60 months' incarceration for three wire fraud counts and 8 months' incarceration on one or more other counts to run consecutive to the aforementioned three consecutive wire fraud counts. Moreover, the 188-month terms imposed on the money laundering counts were lawful. Similarly, the other defendants each could have had an appropriate combination of consecutive and concurrent sentences in order to achieve the total incarceration to be imposed.

The sentences for all defendants could be modified to avoid the sentences on individual wire fraud counts that are in excess of the 60-month statutory maximum. The government concedes that the modifications for individual counts should be made for all defendants. Such changes would not affect the total terms of incarceration. As to all defendants, except Iles whose term of supervised release is already 3 years, the term of ** 12 supervised release could be reduced to 3 years. The version of the Rules of Criminal Procedure applicable to this case do not permit this court to make such corrections at this time. Fed. R. Crim. P. 35, 36. The limited remand also does not permit the court to actually change any sentence at this time. If, following today's ruling, the Seventh Circuit remands the case to modify the sentences to correct the inaccurate assumptions about the wire fraud statutory maximums, the court will do so at that time. Otherwise, if cognizable on such a motion, defendants would have to bring §2255 motions in order to seek correction of their sentences.

IV.

A. Peitz

Peitz argues that he should be sentenced to less than the Guidelines range based on facts that did not affect his total

offense level under the Guidelines. He contends the court should take into consideration that he received approximately $2,500,000 of the proceeds, which is about half of what Benson received and substantially less than the $11,000,000 plus of losses resulting from the entire scheme that was taken into consideration under the Guidelines. He also contends that it should be taken into account that, although *4* levels were added for his role as a leader of the wire fraud scheme, he did not remain a leader throughout the entire scheme. He further contends that it should be considered that his abuse of a position of trust related to only part of the scheme and not the entire scheme. Other than a present expression of remorse, see Letter from Peitz dated ** **13** May 23, 2005, Peitz points to nothing from his personal background that would support sentencing him below his Guidelines sentencing range. The personal history contained in his PSR has been examined and the court has found nothing that requires particular consideration regarding a possible sentence outside the Guidelines sentencing range.

The factors cited by Peitz do not provide a good reason to sentence him outside his Guidelines range. Peitz was the principal organizer of the scheme. He organized schemes that were designed to cheat investors out of more than the approximately $11,000,000 that was actually lost. That Peitz was not directly involved in every aspect and stage of the schemes was not Peitz's choice. He endeavored to remain involved in the schemes, but was closed out by Benson. When there are multiple participants in a scheme, it is certainly no surprise that no individual receives the entire benefits of the scheme. Peitz, however, was a member and organizer of a group endeavor--one that was found to be a conspiracy. The court agrees with the Guidelines' principle that a member of a group activity be held responsible for all the losses resulting from that activity. Peitz was not someone on the fringes who might be considered less responsible. While Benson received a

larger amount of proceeds and remained in the scheme for a longer period of time, he was less of a leader and organizer than Peitz. Thus, it was fair to give both Peitz and Benson the same sentence. Now knowing that the Guidelines are not mandatory, and even taking into consideration Peitz's present and belated expression of remorse, the court would not give Peitz a different sentence.

**14 None of the particular facts about Peitz's involvement in the offenses or his background, either viewed separately or as a whole, support that the Guidelines sentencing range fails to provide a reasonably adequate estimate of the sentence appropriate to serve the purposes set forth in 18 U.S.C. §3553(a)(2) or that that range was reached without taking adequate account of the factors required to be considered under §3553(a).

B. Benson

Benson presents no specific argument as to why his sentence should be any different than was previously imposed. As indicated above, it is appropriate to give Benson and Peitz the same sentence based on Benson's lengthier involvement and receipt of additional proceeds, but his lesser role as a manager instead of a leader.[3] Benson's PSR has been examined. Limited information about his family background shows that his parents were divorced when he was young, he lost contact with his father shortly thereafter, his mother remarried a number of times, and that, since high school, he has had little contact with his mother, stepfather, or siblings. There is undetailed information about abuse. The background information about Benson is not particularly remarkable. The court finds no

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[3]The 1-level difference between a manager and leader is why Benson's Guidelines sentencing range is lower than Peitz's. See Peitz, 2003 WL 1964241 at *1.

information that would be good reason to sentence Benson outside his Guidelines sentencing range.

**15 None of the particular facts about Benson's involvement in the offenses or his background, either viewed separately or as a whole, support that the Guidelines sentencing range fails to provide a reasonably adequate estimate of the sentence appropriate to serve the purposes set forth in 18 U.S.C. §3553(a)(2) or that that range was reached without taking adequate account of the factors required to be considered under §3553(a)

C. Paladino

Paladino was sentenced to 72 months' incarceration, the shortest sentence of any of the five defendants who went to trial. That sentence is 6 months less than Iles's sentence and 12 months less than Law's sentence. Unlike Iles and Law, Paladino was involved in the money laundering offenses as well as the wire fraud offense. Paladino obtained $1,078,182 of the proceeds of the fraud. Only $6,084 of the proceeds he obtained was recovered by the receiver. Paladino contends that three factors support sentencing him below his Guidelines sentencing range: (a) his cooperation with the SEC investigation; (b) his character and family background; and (c) his limited involvement in the offense. At the time of sentencing, the latter two were argued as grounds for a downward departure. Items (a) and (c) were also argued as part of the reasons for a reduction based on a diminished role in the offense and as grounds for sentencing Paladino on the low end of his sentencing range.

When the SEC was conducting its civil investigation, Paladino provided some assistance in that investigation. He informally provided information, he testified at a deposition

**16 (which was used against him at his criminal trial),[4] and he aided the SEC and a receiver in locating assets. As to the criminal charges, Paladino and the government discussed a possible plea agreement, but no agreement was reached and Paladino did not provide any actual assistance to the prosecution. No basis existed for a downward departure pursuant to U.S.S.G. §5K1.1 because the government did not move for a such a departure and Paladino did not provide substantial assistance in the prosecution nor, apparently, the criminal investigation. He now contends that, not being limited by the Guidelines provisions regarding downward departures, the court can take into account the cooperation with the SEC investigation. Paladino also places weight on the view of the SEC attorney involved in the civil investigation that he did not recommend criminal charges against Paladino.

In sentencing Paladino near the low end of his sentencing range, it was considered that he had provided some cooperation with the civil investigation. It was also considered that he had testified at trial and essentially admitted some of the allegations against him. While admitting facts against his interest, Paladino was still attempting to avoid a conviction, which was certainly within his rights. Under the Guidelines, if Paladino had fully accepted responsibility, he would have received a 2-level reduction. See U.S.S.G. § 3E1.1(a). Assuming all other aspects of his Guidelines calculation remained the **17 same, that would have reduced his total offense level to 25 and his Guideline range to 57-71 months, a range reduction of 13-16 months. Since Paladino did not actually accept responsibility, any adjustment based on his limited assistance with the civil case should be for less than 13-16 months. Sentencing Paladino toward the lower end of his Guidelines sentencing range adequately took into account his cooperation

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[4]Paladino also testified at trial, substantially admitting many of the government's allegations against him.

with the SEC. Based on that cooperation, the court would not reduce Paladino's sentence further knowing that the Guidelines are not mandatory.

It is argued that Paladino has an exemplary personal and family background. It is certainly commendable that Paladino has loving family relationships, but the court does not find that to be a basis for reducing his sentence. To the extent Paladino was generally of honorable and honest character, that generally goes along with the fact that he initially believed he was involved with a legitimate investment vehicle, but failed to pull out after it became evident that the investments were not legitimate. That is taken into account by the 2-level reduction for a minor role in the offense. Paladino received substantial proceeds and substantially aided the scheme even after he had information revealing the nature of the scheme. He was willing to receive dishonest proceeds that were needed to keep his business endeavors from failing. Even if his character indicates a reduced chance of recidivism, that must be balanced against an appropriate sentence for the serious crime that was committed and avoiding unwarranted disparities with other defendants. While **18 Paladino, Law, and Iles all had the same total offense levels,[5] Law and Iles had higher Guidelines ranges because of their higher Criminal History Category. Paladino received substantially more proceeds than the other two. While it is appropriate to sentence Paladino to less time than Law and Iles, his sentence should still remain close to that of the other two. The 72-month sentence appropriately takes

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[5]For the wire fraud offenses, Law and Iles were actually 2 levels higher than Paladino. However, Paladino's total offense level for money laundering was equal to the wire fraud total offense levels for Law and Iles. See Peitz, 2003 WL 1964241 at *2.

into consideration Paladino's involvement, his background, and the sentences imposed on the other defendants.

Paladino also points to the difficult time that his family, particularly his wife, will have while he is away at prison. He relies on the same information that was provided at the time of sentencing. At this time, his family has already been through approximately two years of Paladino's absence. It is not unusual that a family will have difficulty when separated from an incarcerated defendant. Submissions support that Paladino's wife was likely to have more difficulty than the usual family member. It was not, however, enough to support a downward departure under the Guidelines. Given the seriousness of the offense and taking into account the greater flexibility post-Booker, still the situation would not be a basis for imposing no incarceration at all. Even if the court were to be convinced that the situation otherwise justified a substantial reduction, such as 1 or 2 years less incarceration, there would still be a **19 4-to-5-year separation. That would not avoid the effect of a lengthy separation. Following Booker, the court does not find the family situation to be a reason to reduce Paladino's sentence.

The other factor that Paladino urges the court to consider is his diminished role in the offense. He was not directly involved with providing false information to investors. Also, initially, he was unaware of the fraudulent nature of the scheme. Paladino, however, became aware of the true nature of the scheme. He was involved in the transfer of funds and was well aware of the scope of the scheme, including the large amount of monies involved. Under the Guidelines, the court applied a 2-level reduction for a minor role in the offense. See U.S.S.G. §3B1.2(b); Peitz, 2003 WL 1964241 at *2. The Guidelines adequately take into account Paladino's diminished involvement in the offense.

As the previous discussion indicates, the three factors raised by Paladino are overlapping. Even considering the factors together, along with all the facts and circumstances concerning Paladino and his involvement in the offenses, the court does not find good reason to reduce Paladino's sentence below the Guidelines sentencing range. None of the particular facts about Paladinots involvement in the offenses or his background, either viewed separately or as a whole, support that the Guidelines sentencing range fails to provide a reasonably adequate estimate of the sentence appropriate to serve the purposes set forth in 18 U.S.C. §3553(a)(2) or that that range was reached without **20 taking adequate account of the factors required to be considered under §3553(a).

D. Law

Law, through his attorney, argues that his 84-month sentence under the Guidelines fails to adequately take into account that, although more than $11,000,000 was lost by investors, he kept approximately $100,000 in proceeds (after splitting proceeds with Wardell and Iles) and that he had no decision-making control over other defendants. He contends that, following Booker, an appropriate sentence for him would be 60 months' incarceration. In an undated letter faxed to the court on May 16, 2005, Law himself contends that the appropriate procedure to follow is to require that all facts considered for sentencing be proved to a jury beyond a reasonable doubt. In support of this contention, Law cites to Justice Stevens' opinion in Booker, 125 S.Ct. at 755-56. Law ignores that the Booker decision is contained in part in Justice Stevens' opinion and in part in Justice Breyer's opinion. Justice Breyer's opinion contains the remedial provisions that are joined in by 5 of the justices. See Booker, 125 S.Ct. at 746, 756-57. As was set forth above, the Supreme Court resolved a constitutional problem by excising §3553(b)(1)'s provision that the sentencing range under the Guidelines must be followed.

Booker, 125 S.Ct. at 764. Since the Guidelines sentencing range is not binding, it is permissible for the sentencing court to find facts that are the basis for determining the sentencing range. McReynolds, 397 F.3d at 481. Law is not entitled to a new sentencing hearing at which facts must be proven to a jury.

** 21 At the time of sentencing, this court found that, pursuant to U.S.S.G. §3B1.1(c), Law's total offense level should be increased 2 levels as a manager of the scheme. That adjustment was not challenged or overturned on appeal. Law marketed the investment program to brokers and investors. Although he personally received approximately $100,000 in proceeds for himself, he obtained $250,000 and split the funds with Wardell and Iles. Law was involved in marketing the investment program to brokers and investors who provided the bulk of the misappropriated investments. Law also provided misleading information to Iles that was to be passed directly to investors. Law had a knowledge and understanding of the scope and structure of the scheme. Even after the investments had been made, Law remained active in the scheme by continuing to provide assurances that the money had been invested and that returns were forthcoming. Law was fully involved in the scheme. Facts do not support reducing Law's sentence based on limited involvement; instead the court found it appropriate to increase his Guidelines offense level based on being a manager.

Although Law personally kept only $100,000 of the fraudulent proceeds, he was involved in most of the investments. Even if not following the Guidelines, the court would consider Law's crime to be one involving approximately $11,000,000 in victim losses. Law was highly culpable in this case. He was given a sentence in the low-middle part of his sentencing range. That adequately takes into account the comparatively low amount of the benefits he received. Also, Law was more culpable than Paladino in that he was involved in passing on misrepresenta-**22 tions. Compared to Paladino,

though, Law received substantially less in benefits. Additionally, it must be considered that, unlike Paladino, Law has a prior criminal history. It was appropriate to impose a sentence on Law that is one year longer than Paladino's.

Further, the court has again examined Law's PSR and has found no good reason to impose a lower sentence. None of the particular facts about Law's involvement in the offenses or his background, either viewed separately or as a whole, support that the Guidelines sentencing range fails to provide a reasonably adequate estimate of the sentence appropriate to serve the purposes set forth in 18 U.S.C. §3553(a)(2) or that that range was reached without taking adequate account of the factors required to be considered under §3553(a).

E. Iles

Iles argues that, following Booker, she should receive a lighter sentence--time already served is suggested--because the Guidelines provision holding her responsible for the $11,000,000 plus loss overstates her involvement. She points to the fact that she received approximately $49,000 in proceeds, which was about the same as the expenses she incurred related to the investments. She also points to the fact that she was not the organizer of the scheme and minimizes her contact with investors. A May 9, 2005 letter from one of Iles's daughters emphasizes that Iles is a loving, caring, and good person, even if naive and less inquisitive than necessary to be involved in the investment of other people's money. In a May 20, 2005 letter from Iles herself, Iles emphasizes her lack of knowledge, contending she **23 fully believed the investments were legitimate until she learned otherwise at trial.

The jury found that Iles had the necessary intent to be found guilty and her conviction has been affirmed on direct appeal. It must be taken as true that Iles intended to defraud the

investors. Like Law, Iles did not organize the scheme. She did, however, actively promote it to brokers and investors. She was the contact for submitting paperwork and she passed on to investors many of the post-investment assurances that the investments remained safe. Iles apparently had less access to information than Law, but she had enough information to know that she was not passing on truthful information. Still, the court considered her to be somewhat less culpable than Law. That, plus the fact that she received limited proceeds were the reasons for sentencing her at the bottom of her Guidelines sentencing range. That does not mean, however, that she was unaware that she was engaged in wrongdoing nor was she unaware that large sums of money were involved. Particularly troubling with Iles is the fact that, because of a prior conviction related to marketing illegal tax shelters, she was subject to an SEC administrative order prohibiting her from engaging in this type of activity even if the investment program had been legitimate. Iles's total offense level was increased two levels based on violating this order. U.S.S.G. §2F.l(b) (3) (B) (1997); Peitz, 2003 WL 1964241 at *2.

Although Iles received only a limited amount of investor proceeds and did not organize the scheme, she still had an important role and was involved with investors or brokers that **24 were sources of a large portion of the investments. Therefore, there is a firm basis for considering the $11,000,000 plus in losses when determining a sentence for her. She is less culpable than Law and that is represented by a sentence that is 6 months shorter than Law's. As was true with Law, Iles is more culpable than Paladino, but received less benefits than Paladino. A higher sentence for Iles than Paladino is appropriate in that Iles has the past criminal history and, unlike Paladino, was violating an order prohibiting her from being involved with investment activity. The fact that Iles had previously been convicted and was violating an order related to that prior criminal activity overrides the present representations that she

is a generally honest person who will not again be in trouble with the law. Following Booker, the court would still impose a sentence at the bottom end of Iles's Guidelines sentencing range. Neither Iles's arguments nor a reexamination of her PSR discloses a good reason to impose a lesser sentence.

None of the particular facts about Iles's involvement in the offenses or her background, either viewed separately or as a whole, support that the Guidelines sentencing range fails to provide a reasonably adequate estimate of the sentence appropriate to serve the purposes set forth in 18 U.S.C. §3553(a)(2) or that that range was reached without taking adequate account of the factors required to be considered under §3553(a).

**25 V.

For the foregoing reasons, the court would not change any defendant's sentence in light of Booker. As was noted above, there was an error in imposing sentences of more than 60 months for individual wire fraud counts. The same total sentence of incarceration would be imposed, but it would be distributed differently among the counts. Also, in light of the correct statutory maximum for the wire fraud offenses, the court would sentence each defendant to three years' supervised released. All defendants, except Iles, received a supervised release sentence of five years. No defendant raised this issue at the time of sentencing. Peitz raised this issue on direct appeal, but the issue is not addressed in the Seventh Circuit's opinion. If the Seventh Circuit deems it appropriate to remand this case to change the incarceration sentence on individual counts and modify the length of supervised release, the court will take appropriate action.

IT IS THEREFORE ORDERED that, in accordance with the limited remand of the Seventh Circuit, the court finds

that, taking into account that the sentencing range determined under the Sentencing Guidelines is not mandatory, the court would still impose the same total sentences of incarceration for each defendant that was previously imposed. Separate from the "Booker" issue, the court notes an incorrect statutory maximum was used when imposing sentences on individual counts. That did not affect the total sentences of incarceration, but it did **26 affect the length of supervised release imposed for defendants Peitz, Benson, Paladino, and Law.

The Clerk of this Court is directed to furnish copies of this Opinion and Order to the Clerk of the United States Court of Appeals for the Seventh Circuit forthwith.

ENTER:

s/ William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: JULY 27, 2005